

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**



74-1976

B

Page 1

UNITED STATES COURT OF APPEALS  
For The Second Circuit

Docket No. 74-1976

SIMON & FLYNN, INC.

Plaintiff-Appellant

- against -

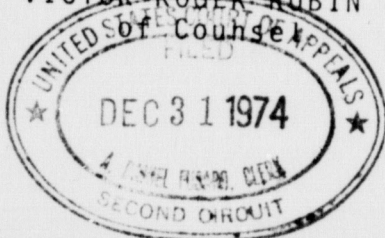
TIME INCORPORATED, TIME INCORPORATED BOOK CLUBS  
NEW YORK GRAPHIC SOCIETY, LTD., WALLYNN, INC.  
SPORTS ILLUSTRATED BOOK CLUB, COMMITMENT  
PRODUCTIONS INC. OF NEW JERSEY, COMMITMENT  
PRODUCTIONS, INC., AMERICAN EXPRESS, CHARLES  
SCRIBNER'S SONS, DOUBLEDAY & COMPANY, INC.,  
GEORGE L. FLYNN, JAMES J. WALSH, "JOHN DOE"  
and "RICHARD ROE",

Defendant-Respondents

BRIEF FOR PLAINTIFF-APPELLANT

JACOB RABINOWITZ  
Attorney for Plaintiff-  
Appellant  
535 Fifth Avenue  
New York, New York 10017

VICTOR ROGER RUBIN



## TABLE OF CONTENTS

Table of Authorities	i
PROCEEDINGS BELOW	1
THE COMPLAINT	2
ISSUES PRESENTED	4
<u>POINT I</u>	
A CAUSE OF ACTION FOR COPYRIGHT INFRINGEMENT WAS STATED CONFERRING JURISDICTION ON THE DISTRICT COURT	5
A. The Complaint Alleged A Cause of Action for Copyright Infringement Based Derivatively on the Work "A Man Named Lombardi"	6
B. The Allegations in the Complaint That Appellant May Have Held A Copyright With Respect to "Vince Lombardi's - The Science and Art of Football" are Sufficient in View of The Entire Complaint	6A
C. Jurisdiction Was Conferred Upon The District Court By Virtue of the Appellant's Equitable Ownership of the Subsequent Copyright on "Vince Lombardi on Football" Obtained by One of the Defendants	9
<u>POINT II</u>	
IN ALL EVENTS THE APPELLANT SHOULD HAVE BEEN GRANTED LEAVE TO REPLEAD	11
<u>CONCLUSIONS</u>	13



# TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
U.S. v. Provident National Bank 259 F.Supp 373 (Rev'd on other grounds);	5
U.S. v. Johns-Manville, 67 F Supp 295;	5
SEC v. Timetrust Inc., 28 F.Supp.34;	5
Black v. Henry G. Allen Co., 42 Fed.618;	6A
Wooster v. Crane & Co., 147 F.515;	10
Ted Browne Music Co. v. Fowler, 290 F.751;	10
Bisel v. Ladner, 1F <sub>2</sub> 436;	10
Historical Pub. Co. v. Jones Bros., 231 F.638;	10
Cohan v. Richmond, 86 F <sub>2</sub> 680;	10
Texas Co. v. Gulf Refining Co., 13 F2nd 873;	10
King v. Edward B. Marks Music Corp. 56 F.Supp 446	10
Southern Music Publishing Co. Inc. v. Walt Disney Productions et al, 73 F.Supp.580	10
Manning v. Miller Music Corp., 174 F.Supp 192;	10
Harrington v. Moore, 186 F.Supp 655;	10
Wallin v. Fuller, 476 F <sub>2</sub> 1204;	12
Local 170 United Textile Workers of America, AFL-CIO v. Federal Paper Stock Co., 461 F <sub>2</sub> 849;	12
United Steelworkers of America, AFL-CIO v. Mesker Bros. Industries, 487 F <sub>2</sub> 91;	12

STATUTES CITED

Rule 8 FRCP. 28 U.S.C.	5
Section 21 Copyright Act	8
Section 28 U.S.C.1338(a)	2

TREATISES CITED

Barron & Holtzoff, Federal Practice and Procedure	5
--	---



---

UNITED STATES COURT OF APPEALS

For The Second Circuit

---

Docket No. 74-1976

---

SIMON & FLYNN, INC.

Plaintiff-Appellant

- against -

TIME INCORPORATED, TIME INCORPORATED BOOK CLUBS  
NEW YORK GRAPHIC SOCIETY, LTD., WALLYNN, INC.  
SPORTS ILLUSTRATED BOOK CLUB, COMMITMENT  
PRODUCTIONS INC. OF NEW JERSEY, COMMITMENT  
PRODUCTIONS, INC., AMERICAN EXPRESS, CHARLES  
SCRIBNER'S SONS, DOUBLEDAY & COMPANY, INC.,  
GEORGE L. FLYNN, JAMES J. WALSH, "JOHN DOE"  
and "RICHARD ROE",

Defendant-Respondents

---

PROCEEDINGS BELOW

This is an appeal by Simon & Flynn, Inc., the plaintiff in the Court below. Appellant sued for copyright infringement and related claims of unfair trade practices and unfair competition.

The appellant moved ex parte to take depositions upon oral examination prior to service of process which application was denied (p.17). After service of the complaint, the

defendants moved to dismiss the complaint for failure of subject matter jurisdiction. The Honorable Mr. Justice Metzner granted the motion in a decision filed June 10, 1974 (pp.61-65). Appellant appeals from the decision dismissing this action for want of subject matter jurisdiction in that it was claimed that the complaint did not fall within Section 28 USC 1338(a) granting copyright jurisdiction (p.66).

Appellant does not appeal from the portion of the decision of the Learned Court below as regards lack of jurisdiction based on diversity of citizenship, and this memorandum will not address itself to that issue but solely to the inherent jurisdiction of the Federal Court to determine copyright matters.

#### THE COMPLAINT

Appellant brought this action for damages, an accounting, and equitable relief against the defendants for their alleged infringements of copyrights held by the appellant. Related claims of unfair competition were also alleged (pp.5-15). Jurisdiction was alleged to be conferred upon the Court by virtue of 28 U.S.C. 1338(a).

The complaint alleges that in May, 1967 Simon & Flynn, the appellant, entered into an agreement with Vincent T. Lombardi, the late coach of the Green Bay Packers Football



Club. The agreement resulted in the copyrighting of the television film, "A Man Named Lombardi" under copyright number LP 40880 (para. 17th, p.8).

Thereafter, appellant produced another work, "Vince Lombardi's-The Science and Art of Football" which was alleged to have been based upon the copyrighted film. A second copyright for the new work was sought and appellant assigned its officer and fiduciary, George L. Flynn (a defendant), the task of securing the second copyright (paras. 19th through 22nd, pp.9-10).

Flynn left the appellant's employ and produced a work called "Vince Lombardi on Football" which work was substantially based upon work which he had attempted to copyright for appellant - Vince Lombardi's - The Science and Art of Football". Flynn then, acting through the auspices of 2 corporations, Wallynn Inc. and Commitment Productions (also defendants herein) procured a copyright of "Vince Lombardi on Football". The remaining defendants published and distributed the work "Vince Lombardi on Football" for Flynn.

It was also alleged in the complaint that defendants, Time Incorporated, Time Incorporated Book Clubs, New York Graphic Society, American Express, Charles Scribner's Sons, Doubleday & Company Inc. and various distributors whose names are fictitiously presented, infringed upon appellant's copyright, engaged in unfair trade and competitive practices,



failed to credit the appellant properly as to editorial rights and proprietary interests, failed and refused to accede to appellant although having received due notice of the rights of appellant. (paras. 39th-44th, p.13).

The relief sought against all of the defendant was to have them enjoined during the pendency of this action and thereafter from infringing upon the copyright of the appellant's work, to pay damages to appellant and to account to appellant for gains and profits arising out of the infringement.

#### ISSUES PRESENTED

I. Did the Court below have jurisdiction based upon copyright infringement under §28 U.S.C. 1338(a).

Answer. Yes.

II. Even if appellant had not copyrighted the work which was the subject of the litigation, did it have an equitable claim for ownership of the copyright sufficient to justify jurisdiction.

Answer. Yes.

III. Was the action of the Learned Court below in dismissing the within action rather than allowing the appellant to replead improper.

Answer. Yes.

POINT I

A CAUSE OF ACTION FOR COPYRIGHT  
INFRINGEMENT WAS STATED CONFER-  
RING JURISDICTION ON THE  
DISTRICT COURT.

It is clear that the Federal Courts have exclusive jurisdiction in copyright matters. 28 U.S.C.1338(a), Federal Practice & Procedure, Barrons & Holtzoff p. 261 (rules edition).

An analysis of the case at Bar clearly indicates that the burden of showing subject matter jurisdiction had been met by the complaint on at least three separate grounds.

Preliminarily to a discussion of the above, it should be noted that the philosophy as well as the objective of the revision of Rule 8 of the Federal Rules of Civil Procedure have been to mandate a liberal view towards construction of the pleadings of a matter before the Federal Courts.

The "short and plain statement" of Section 8(a)(1) and the "substantial justice section of 8(f) indicate that the widest possible latitude is to be afforded the construction of the pleadings before the Court. The decisions in the courts have substantiated this view.

U.S. v. Provident National Bank, 259 F.Supp. 373

U.S. v. Johns-Manville, 67 F.Supp 291

SEC v. Timetrust Inc., 28 F.Supp. 34



A. The Complaint Alleged A Cause of Action  
For Copyright Infringement Based Derivatively  
On The Work "A Man Named Lombardi"

In the first instance, allegations were made that the appellant was the owner of copyright #LP 40880 the registration number for the television film, "A Man Named Lombardi" (paras. 14th through 18th, p.8).

Paragraphs 19th through 23rd (pp. 9,10) allege the formulation of a subsequent work by the appellant under the title "Vince Lombardi's - The Science and Art of Football". This second work referred to in paragraph 19th (9) of the complaint was alleged to have been based upon the materials and work product of the copyrighted first work.

It is clear therefore, that the second work was alleged to be covered by the copyright of the first work (para. 19th, p.9).

Defendant Flynn in his forward to "Vince Lombardi on Football" states that "the scripts and narration (for "Vince Lombardi's - The Science and Art of Football") provided the basic blueprint on which these volumes ("Vince Lombardi on Football") were constructed" (p.25).

As "Vince Lombardi's - The Science and Art of Football" was alleged to be a derivative work from "A Man Named Lombardi" which held the aforementioned copyright (para. 17th, p. 8), the allegation as to identify of the works made out a prima facie case of infringement of the copyrighted work, by "Vince Lombardi on Football".

The Learned Court erred in not considering the argument presented in paragraphs 19th through 27th (pp. 9-10) which alleged clearly that the second work was based upon the copyrighted first work.

Black v. Henry G. Allen Co., 42 Fed. 618

- B. The Allegations In The Complaint That Appellant May Have Held a Copyright With Respect to Vince Lombardi's - The Science and Art of Football are Sufficient In View of the Entire Complaint.

Appellant acting through its officer and fiduciary, Flynn, sought to have the work "Vince Lombardi's - The



Science and Art of Football" registered with the Copyright Office (paras. 20th through 22nd, p.9). The assignment to procure the copyright was given exclusively to Flynn who had a thorough knowledge of the work.

Extensive correspondence followed between the Washington Office of Registry and defendant Flynn. Appellant, however, claimed it was without complete knowledge as to whether a proper registration was the result. (paras. 20th through 23rd, pp. 9 & 10). The lack of this knowledge forced the appellant to plead as best it could and resulted from it's former fiduciary.

Flynn, having appropriated the fruits of the copyright and the source materials for his own purposes through the use of corporate documents.

Thereafter, Flynn left the employ of the Appellant and together with others (and by the use of controlled corporations) entered into an agreement with defendant, The New York Graphic Society, which agreement stated that Flynn was one of the proprietors of a work entitled "Vince Lombardi on Football". (pp. 37A-D, para. 24, p.10).

Defendant Flynn is alleged to have either directly or indirectly, a substantial interest in defendant Wallynn Inc. (para. 28, p. 11). Wallynn Inc. obtained a copyright to "Vince Lombardi On Football" (para. 32nd, pp. 6-7).



In order to establish the true facts and if need be, amend its pleadings, appellant in or about January, 1974 sought to take depositions upon oral examinations of the defendant (pp.16-39). This ex parte application was denied the appellant by the Learned Court below (p. 17).

Defendant Flynn should be in possession of knowledge as to the actual status of the copyright of "Vince Lombardi's - The Science & Art of Football"; knowledge of the intricate publications and financial arrangements among the defendants with respect to the publication of the book, "Vince Lombardi on Football"; as well as the machinations indulged in by Flynn in purporting to obtain certain assignments from the appellant to various defendants (p.21).

The appellant, being denied the depositions requested, stands without knowledge as to the foregoing. In its complaint it pleaded that of which it had knowledge. In light of the above, the appellant must seek to take advantage of the liberal rules of pleading as provided for in Rule 8 of the Federal Rules of Civil Procedure (p. 5 supra).

Certainly Flynn has knowledge as to whether the copyright he applied for on behalf of appellant falls within Section 21 of the Copyright Act commonly called the "saving Clause". The clause provides that an action may be maintained against persons who with knowledge of a copyright seek to infringe it, even where the copyright is not issued because of omission by "accident or mistake".

It is clear that if appellant were within the "saving clause" it would be constrained to beg leave to amend its complaint to make more definite allegations of infringement, as it would hold such a right under the act.

Appellant was aware only that it sought, through defendant Flynn, to take all proper steps to secure a valid copyright of its work. Appellant believed that it came within this "saving clause", however definite information was necessary from defendants with knowledge.

Certainly then, the allegations contained in paragraphs 20th through 22nd, that the appellant may have a separate copyright in "Vince Lombardi's - The Science and Art of Football" are sufficient to sustain the subject matter jurisdiction in the instant case. This is particularly true where appellant alleged a lack of knowledge because of the conspiracy and actions of its former fiduciary who later purported to copyright the appropriated work for his own benefit.

C. Jurisdiction Was Conferred Upon The District Court By Virtue of the Appellant's Equitable Ownership Of The Subsequent Copyright, on "Vince Lombardi on Football" Obtained By One of the Defendants.

Defendant Wallynn Inc. had obtained a copyright on "Vince Lombardi on Football" (para. 32nd, p. 11-12) which was based upon the appellant's copyrighted work, "A Man Named Lombardi" (para. 33, p.12), and on the source material



sought to have been copyrighted by Flynn while an employee of appellant - "Vince Lombardi's - The Science and Art of Football".

Clearly, therefore, the allegations in the complaint spell out a fraudulent action by a fiduciary of the appellant, namely Flynn, who appropriated the work of appellant for his own use and benefit (or for his controlled corporations). Appellant, however, remains the equitable owner of this work and hence, has the equitable ownership of the copyright.

It has long been the law that the equitable owner of a copyright may maintain an action against the nominal owner of the legal title to the copyright.

Ted Browne Music Co. v. Fowler, 290 Fed.751

Wooster v. Crane and Co., 147 Fed.515

Bisel v. Ladner, 1 F2 436

Historical Pub. Co. V. Jones Bros., 231 F638

Cohan v. Richmond, 86 F2 680

Texas Co. v. Gulf Rating Co., 13 F2 873

King v. Edward B. Marks Music Corp., 56 F.Supp.446

Southern Music Publishing Co. v. Walt Disney Productions,  
73 FS.580

Manning v. Miller Music Corp., 174 F.S.192

Harrington v. Mare, 186 F.Supp.655

It is clear, therefore, that in reading the instant complaint as a whole, allegations are set forth showing

the breach of a fiduciary relationship by an officer of the appellant, which breach took the form of a willfully fraudulent failure to procure a copyright for the appellant followed by the procuring of a copyright in the same material for the personal gain of the fiduciary. The copyrighted material was the work product of the appellant. Therefore, an equitable proprietary interest in the copyright procured by Wallynn was established.

It is abundantly clear, therefore, that the Court below erred in denying subject matter jurisdiction to appellant.

If the appellant is denied a hearing in the Federal Court as to equitable ownership of the copyright - where may it go to establish its claim? Surely the statute granting the Federal Courts exclusive jurisdiction in copyright matters, grants to the Federal Courts the right to determine ownership of a copyright alleged to have been fraudulently obtained.

#### POINT II

IN ALL EVENTS, THE APPELLANT  
SHOULD HAVE BEEN GRANTED LEAVE TO  
REPLEAD

The complaint as a whole spells out a conspiracy to defraud the appellant by defendant - Flynn, and those acting in concert with him. The object of the defendants is to force the appellant to go to the state court where



appellant would be precluded from asserting copyright infringement.

Obviously, however, the essence of the statute which grants the Federal Courts exclusive jurisdiction over copyright infringement actions would be frustrated if the actions of fraudulent conversion of appellant's rights in the copyright were denied to it because of a narrow interpretation of the pleadings.

In the case at Bar, the culprit made the improper filing on behalf of the appellant but then filed properly for himself. May he then compound his fraud by having the Federal Court jurisdiction denied to appellant? Further, the appellant must get every favorable presumption because his knowledge of the actions of the culprit are limited. The dismissal of the within action rather than the granting of appellant's request to re-plead (59) would be a great miscarriage of justice; particularly in light of the Court's holding that leave to amend pleadings should be fully granted to establish jurisdiction.

United Steelworkers of America, AFL-CIO v. Mesker Bros. Industries, 457 F<sub>2</sub> 91;

Wallin v. Fuller, 476 F<sub>2</sub> 1204;

Local 170 United Textile Workers of America AFL-CIO v. Federal Paper Stock Co., 461 F<sub>2</sub> 849.



### CONCLUSIONS

A cause of action for copyright infringement was stated by the complaint, thereby conferring jurisdiction on the District Court. Appellant's work "Vince Lombardi's - The Science and Art of Football" was protected derivatively through the prior copyright. Appellant alleged that it was the equitable owner of the copyright in the work "Vince Lombardi on Football" through the faithless actions of its officer-fiduciary, Flynn, and as the equitable owner has a proprietary interest giving the court subject matter jurisdiction. That in any event the proper remedy would be to grant the appellant's request for leave to re-plead, rather than dismiss the within action precluding the appellant from losing it's day in Court.

Respectfully submitted,

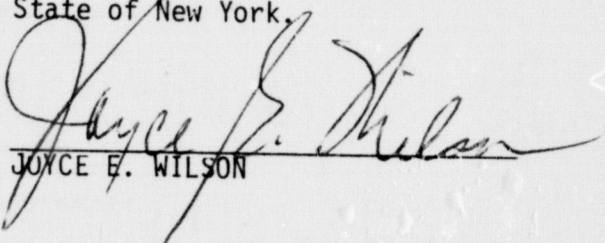
JACOB RABINOWITZ  
Attorney for Plaintiff-Appellant  
535 Fifth Avenue  
New York, New York 10017

VICTOR ROGER RUBIN  
of Counsel

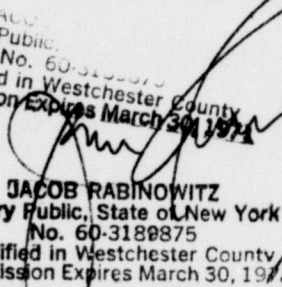
STATE OF NEW YORK )  
COUNTY OF NEW YORK)

JOYCE E. WILSON, being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at New York, New York.

On December 31, 1974, deponent served the within Brief upon the respective attorneys for the defendants at their respective addresses, designated by said attorneys for that purpose, by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

  
JOYCE E. WILSON

Sworn to before me this 31st  
day of December, 1974.

  
JACOB RABINOWITZ  
Notary Public, State of New York  
No. 60-318875  
Qualified in Westchester County  
Commission Expires March 30, 1975